Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term 2008

Dr. Marie A. Faltas

versus

Sharon B. Koon

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

This Court last visited residential tenants' rights in *Lindsey v. Normet,* 405 U.S. 56 (1972), at which time about 30% of American families lived in apartments or other rented dwellings. Since then, the Uniform Residential Landlord and Tenants ACT, 7B U.L.A. 427, *et seq.* ("URLTA") was formulated and eventually adopted by twenty-one states.

Alaska gives month-to-month tenants all rights of leaseholders except one; in Arizona tenant has Fourth Amendment rights in his rented home; Hawaii and Florida reject summary judgment in contested landlord-tenant cases; Montana rejects a "homestead exemption" for landlord; New Mexico voided a lease 17% above fair-market value; and Oregon held tenant-favoring statute constitutional.

But South Carolina accepted landlord's 30-day notice to vacate, even for the *sole* stated reason of tenant's rejection of a hike that would have brought the rent to 40% above fair market, as justifying eviction by summary judgment.

This conflict among the states, and between this Court and South Carolina's Supreme, urges these questions:

1. Do the life-disrupting eviction of a residential tenant by state coercion and tenant's Fourth Amendment right to peace in her home require clear and convincing proof in contested cases thus precluding summary judgment?

or alternatively stated:

1. May state, by statute, mandate only fair market rent be paid in case of dispute yet allow summary eviction if tenant refuses to pay 40% above fair market value?

2. Must states who adopt federal recusal statute *verbatim* also apply this Court's interpretation thereof?

or alternatively stated:

2. Does due process require litigant to *prove* actual bias or does it suffice to show that reasonable observer would question the judge's impartiality?

List of Parties

Respondent, Sharon B. Koon, (hereinafter "Landlady") was the plaintiff before the magistrate and thereafter the appellee before the Richland County Circuit Court, the SC Court of Appeals and Supreme Court.

Soraya F. Fares was a defendant and appellant below but is not a party to this petition.

Petitioner, Dr. Marie A. Faltas, (hereinafter "Tenant") was a defendant and appellant below.

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Petition for a Writ of *Certiorari*

This Court is respectfully petitioned to review the judgment of the Supreme Court of South Carolina in this case.

Opinions Below

South Carolina's Supreme's reported opinion, *Koon v. Fares and Dr. Faltas,* 666 S.E.2d 230 (2008); and lower state tribunals' unreported decisions are in Appendix A.

Jurisdiction

The Supreme Court of South Carolina's opinion issued on 18 August 2008. A timely petition for rehearing was denied on 18 September 2008. By order dated 9 December 2009, the Honorable Chief Justice of the United States kindly extended the time to file this petition to 13 February 2009.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(b).

Constitutional and Statutory Provisions Involved

Amendments IV and XIV to the U.S. Constitution provide in relevant parts, respectively:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ....
>
> nor shall any State deprive any person of ... property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 501 E (1), SCACR, and 28 U.S.C. §455 (a) and (b)(1) provide in relevant parts, respectively:

> A judge shall disqualify himself in a proceeding in which [his] impartiality might reasonably be questioned, including but not limited to: (a) [he] has personal bias or prejudice concerning a party or a party's lawyer, ...
>
> Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned [and] where he has a personal bias or prejudice concerning a party, ...

Relevant parts of South Carolina's Residential Landlord Tenant Act ("SC RLTA"), §§27-40-10 *et seq.*, SC Code of Laws, and other statutory provisions are in Appendix B.

STATEMENT OF THE CASE

Landlady and Tenant entered into lease for a house in Columbia, SC, at $795.^{00}$/month rent from 9 August 2002 to 8 August 2003, and continuing month to month thereafter until *Tenants* give 30-day notice. (R pp 191-2)

The relationship was satisfactory until Landlady demanded, in December 2004, a rent increase of $100.^{00}$/month. Tenant refused to pay that rate and Landlady wrote her requesting that she move by 15 March 2005. (R pp 193-4)

After negotiations, Tenant gave *contingent* notice to move by 9 August 2005, *without interim increase in rent* and, by letter of 15 March 2005, Landlady accepted that notice. (R pp 195-7) Tenant later wrote Landlady that, due to circumstances beyond Tenant's control, she was unable to move by August 2005 but will give a new 30-day notice as soon as she can. (R pp 198-9, 142) The relationship then became strained with Landlady accepting and cashing Tenant's timely checks for the $795.^{00}$/month but refusing to make the necessary repairs and maintenance that became due and Tenant commensurately reduced rent payments.

In January 2006, Landlady wrote to Tenant that Landlady is "waiting patiently" for Tenant to move; and, in February 2006, Landlady sought eviction, alleging non-payment of rent, and end and breach of lease. Tenant timely answered, moved to dismiss case, and raised defenses and counterclaims under South Carolina's Residential Landlord Tenant Act ("SC RLTA"), §§27-40-10 *et seq.*, SC Code of Laws.

Magistrate Davis, who had given Landlady legal advice, recused himself at Tenant's request and sent the case to Magistrate Newsom, who held a hearing on 22 March 2006 on Tenant's motion to dismiss. The hearing began with Magistrate Newsom holding Tenant in contempt of court (later withdrawn) because she had objected to the magistrate taking testimony on a motion to dismiss for legal insufficiency and had attempted to seek leave to sit down for health reasons when not addressing the magistrate.

Terrified by the scepter of undeserved incarceration, and often interrupted by the magistrate, Tenant still managed to argue to him that due process and this Court's First Amendment and Title VII jurisprudence require the tribunal to void any notice to vacate given in express retaliation for the exercise of a protected right. Specifically, these transcribed passages from the hearings before the magistrate read; *e.g.* (R pp 139-42 and 134-37):

*Dr. Faltas: Even if it didn't, I would like Your honor to be very *** vigilant about the use of ... the notice ... to terminate any lease ... to extort a tenant to pay higher than the---*

Magistrate: (interposing) [T]he issue of money, who owes what, the only thing I do on evictions is decide for setting the bond and the monthly payments. That ... other issue will be decided obviously, you all have put a jury trial issue on that, that will be decided by a jury. So, there is no need to argue that as far as the money.

Dr. Faltas: I'm not saying it relates to who owes what. I'm saying it relates to: she had, she has lost the legal right to give a 30-day notice once she has revealed her intent to use that notice in a quasi-extortionate ---

Magistrate: (interposing) Do you have any case law on that? Or is that your opinion? ***

Dr. Faltas: All of the Title VII and the First Amendment U.S. Supreme Court law on pretext is that, for instance, once an employee takes an action that is protected by First Amendment and the employer says I want to fire you for, for having and then goes back

Magistrate: (interposing) And fires them.

*Dr. Faltas: but gives another reason, then the U.S. Supreme Court says: "No, no, no. Once you have proven your intent, then you lose the right to even raise another issue because it is presumed pretextual." *** Same with employment discrimination. *** The ... cases about pretext in the First Amendment context is Mount Healthy School District v. Doyle. In the Title VII context ---*

Magistrate: (interposing) So, so your position would be that whenever they wanted to ask for higher rent, that they were prohibited for, in perpetuity, forever having you leave at the term being ended.? ***

*Dr. Faltas: When the rent raise is unconscionably above the fair market value, Yes. Because ... otherwise [it] allow[s] ... an end run around the intent of the legislature. ****

Magistrate: (interposing) And again, the amount of the fair market value is, is not the purpose of this motion. ***

*Dr. Faltas: [S]he upped and wanted to raise $100 above ... what her own expert says is the reasonable value. Therefore, in order to give effect to the statute as a whole ... Title 27, Chapter 40, Section 240, 230(b). ****

Magistrate: Unconscionability? * Let me take a look at that. "(b) Unconscienability." ... What else?**

*Dr. Faltas: .... That, that it would be unconscionable, first of all the "Expressio unis est exclusio alterior" applies here. The contract gives only Mother and me, the tenants, the right to give 30-day notice. It does not give them that. Second, even if it did give it to them, they are exercising it in an unconscionable quasi-extortionate manner in a way that undermines the purpose of the statute, which is section, Title 27, Chapter 40, Section 790(a): "In the event, the rent must be the fair market value." *** And I went into that ... in my recent pleadings *** The unconscienability is the unilateral raising of the rent above, to $100 above what her own expert says is the fair rent, which I say is already less than that, so she raised it $200 or $250, and the use of the threat to terminate in order to enforce an unconscionably high rent ...*

*The legislative intent is for tenants to pay the fair rental value and no more. And I gave Your Honor in my written submissions, the law recognizes that there is not necessarily parity between two parties to a contract.*** It's as if ... any other state employee if they, their immediate supervisor wanted to fire them, they can't without going through the Administrative Procedure Act. But if the employee wanted to leave, she doesn't need to do anything except leave. If I want to, to move, I don't have to go to the magistrate and write an application [or] get a sheriff to move me out. She cannot keep me there beyond what I want. But if she wants me to leave involuntarily, she has to file for ejectment and get, get an order. So, ... it's not a situation of parity. It's a situation where the law recognizes there is a weaker side and a stronger side and the statute gives more rights to the weaker side.*

And ... the unconscionable raise of the rent to undermine the intent of the law is unconscionable. Because, if that were so, since the Legislatur wants the tenants to pay only the fair rental value, and nothing more.

*And it says that once it becomes month to month, the rental amount is the fair market value of the rent in the absence of, of other agreements. So then, every landlord can raise it, saying "O.K. I want to raise it $1,000 more; and if you don't like it, I give you notice." O.K., I agree: "This month, I'll pay you $1,000 more." Next month, "I want $1,000,000 more." Whether it's $100 or $1, the unconscionability is ... the quasi-extortionate use of the notice to raise the rent above the fair rental value. Plus, if you look at the lease, it only says the tenant may give 30-day notice. The statute may say that either side ---****

Magistrate: (interposing) *** I don't want to hear any more arguments about fair market value. O.K.? You all have, you said it's this. He said it's that. And if it's different amounts, that's what the jury will decide.

*Dr. Faltas: *** She has in writing, in writing, much more recently than that, number one, said that they are "patiently waiting" for me to move. And that was after that. Second, my notice to move ---*

And Tr. p 4, of 22 May 2006 Hearing (R p 152):

Dr. Faltas: Your Honor, respectfully, I did argue public policy and that courts should prevent parties from circumventing or undermining public policy --

Magistrate: (interposing) I understand; but there is no law in this state to cover that. We're not a socialist state; we're not a communist state. It's a free market state. If they want to charge you two million dollars a day to stay there and you don't want to pay, your option is to move. O.K.? There's no rent control. O.K.?

Dr. Faltas: NO. Actually, <u>there</u> <u>is</u> <u>rent</u> <u>control</u>. The legislature said "fair market value." That is a form of rent control; and courts should--

Magistrate: (interposing) And again, as far as what you owe and them, *that's for a jury to go on and decide one day.* I don't want to make any comments on that. O.K.?

Mag. Newsom then ruled at R pp 142-4 (Tr. of the May 10, 2006, hearing) before granting summary judgment:

[I]n February 2005 there is two letters that you agree you received and they agree they sent. But then there was rent paid after that. So, the issue is in law, not in fact.

Does that bind them to allow you to stay? Do they have to give you written notice again? I thought they did. I thought quite frankly they were going to have to start all over again. ***However, §27-40-710 (b) "The landlord's obligation to provide notice under this section is satisfied for any lease term after the landlord has given one such notice to the tenant or if the notice is contained in conspicuous language in the written rental agreement."*** *It was not contained in the written rental agreement but it's clear that [notice] was given.*

**** also by what was ... presented ... in a previous hearing that in January 2006 there was communication saying: "When are you going to move?" And that, I assume, was in anticipation of them, your communications of August saying you may or may not move.*

My ruling is that I will issue the writ in 5 days on the grounds that the tenancy has ended. I am not speaking to, nor do I intend to address, the amount of the back rent, who owes what, whether the plaintiff owes you because she charged an unconscionable amount or whether you owe her because you did not pay enough.

There's 3 grounds that you asked for on the issue. Had I not found that statute before, I was going to grant Ms. Faltas the same summary judgment and dismiss your action because you didn't, because I thought that you would have to give them written notice again; but the statute clearly says once, one written notice is sufficient.

Again, if the statute was different ..., I'd have to change because, ... depending on what I heard in addition today, I frankly thought I would be ruling for Ms. Faltas and dismissing this action; and you all would have to start again. Now, having said that, had they started again, they could have filed 5 minutes from now and in 30 days you would be removed because, once you're in a month-to-month, once they tell you you got to leave, they have the right to do that.

Tenants appealed to Richland County Circuit Court and again raised the constitutional issue in oral argument on their appeal before Circuit Judge Barber as transcribed:

Dr. Faltas: *YOU ALWAYS TELL JURORS BEFORE YOU IMPANEL THEM OR GIVE THEM THE CASE, ... THAT THEY SHOULD FOLLOW THE LAW AS YOUR HONOR TELLS THEM WHAT THE LAW IS, NOT WHAT THEY WISH THE LAW WERE. *** WHEN YOU BECAME A JUDGE ..., YOU SWORE FIRST OF ALL TO THE CONSTITUTION OF THE UNITED STATES. AND THE FOURTH AMENDMENT PROTECTS PEOPLES' HOUSES AND EFFECTS. [Page 7] IN AN EVICTION ACTION, THE -- A PARTY IS TRYING TO INVADE SOMEBODY'S HOME, BECAUSE EVEN THOUGH IT IS RENTED, IT IS UNDER THE FOURTH AMENDMENT, MY -- MY HOME, AND HERE THE U.S. SUPREME COURT HAS SAID IN THREE OCCASIONS THAT WHEN THERE IS SOMETHING SUBSTANTIAL LIKE TERMINATION OF PARENTAL RIGHTS OR DENATURALIZATION OR DEPORTATION ARE THINGS THAT REALLY ARE LIFE-DISLODGING. IN FACT, IT IS A VERY HIGH STANDARD OF PROOF. [THIS IS] NOT A RUN OF THE MILL CIVIL DISPUTE. WE'RE ABOUT SOMEBODY WHO'S TRYING TO INVOKE THE POWER OF THE STATE TO INVADE SOMEBODY'S HOME WHICH IS PROTECTED UNDER THE FOURTH AMENDMENT. MAGISTRATE NEWSOM ... SAYS "THIS IS NOT SOCIALIST BLAH BLAH BLAH." BUT ... THIS IS A REGULATED ECONOMY. THERE ARE -- THERE ARE MINIMUM WAGE LAWS, ... ALL KINDS OF LAW. [Page 8] ****

*THERE IS NOTHING THAT SAYS THAT SHE HAS TO PUT HER HOUSE UP FOR RENT. BUT ONCE SHE DOES, SHE IS BOUND BY THE SOUTH CAROLINA RESIDENTIAL LANDLORD TENANT ACT. [Page 8] SHE SAID, EITHER YOU PAY THAT OR YOU GET EVICTED. AND ... BEFORE MAGISTRATE NEWSOM, SHE SUBMITTED AN AFFIDAVIT FROM HER OWN PURPORTED EXPERT SAYING THAT THE FAIR MARKET VALUE IS 795. SO ON THAT, THERE SHOULD BE SUMMARY JUDGMENT TO ME BECAUSE HER OWN EXPERT SAYS THAT THE RENT VALUE IS LESS THAN WHAT SHE WANTED TO CHARGE. *** MAGISTRATE NEWSOM ... SAYS, "IT DOESN'T MATTER SO LONG AS SHE HAS ONE AND A HALF YEARS AGO GIVEN AN EVICTION NOTICE THAT IS STILL IN EFFECT." [Page 10] HERE WE HAVE IN WRITING ...WHERE SHE RESCINDED THE PRIOR NOTICE OF TERMINATION OF THE LEASE. THERE WAS NOTHING THE MAGISTRATE COULD GO BY. AND SO IT'S A CLEAR ERROR OF LAW. [Page 11]*

> *THE LAW ... IS TENANT FAVORABLE. AND THE LEGISLATURE MADE IT THAT WAY, BECAUSE IF A TENANT WANTS TO LEAVE, THEY JUST LEAVE. THEY DON'T HAVE TO GO TO THE SHERIFF. BUT IF THE LANDLORD WANTS THE TENANT TO LEAVE, THEY HAVE TO INVOKE THE POWER OF THE STATE. AND INVOKING THE POWER OF THE STATE TO COERCE SOMETHING ISN'T SOMETHING THAT SHOULD BE TAKEN LIGHTLY. [Page 11, line 13]*

Judge Barber refused to recuse himself for deriding what he branded Dr. Faltas' litigiousness and having previously affirmed her misdemeanor conviction procured by fabricated evidence. (Upon later proof that all evidence used against her was fabricated, Dr. Faltas' conviction was set aside and she was later acquitted upon attempted retrial.)

Judge Barber decided to affirm the magistrate and asked Landlady's counsel for a draft order, which was eventually hand-delivered totally *ex parte* to Judge Barber. Only after Judge Barber's order, with language so partisan as to have been written by Landlady's counsel, did Tenant discover a draft order had indeed been delivered to Judge Barber *ex parte. And only much later was Tenant allowed to see that draft.* It confirmed her suspicion that the intemperate language is taken *verbatim* from the draft delivered *ex parte.*

Tenant then moved Judge Barber to vacate his order, to recuse himself and allow another circuit judge to rehear the appeal *de novo*: Judge Barber denied all that. Tenant appealed to SC's Court of Appeal. Using inflammatory language, including branding Dr. Faltas a misdemeanant for *the* conviction Judge Barber had wrongly affirmed, Landlady sought and obtained certification to SC's Supreme Court and expedited briefing without opportunity for Tenants to obtain counsel. SC's Supreme refused to hear oral arguments and issued the judgment this Court is prayed to review by *certiorari*.On 30 September 2008, and although her rent was paid till 9 October 2008, Tenant was brutally evicted with the sheriff helping Landlady to rifle through Tenant's papers and throw her dear objects in the mud.

REASONS TO GRANT THE WRIT

I. To Resolve a Fully-developed Inter-State Conflict And Revisit the Dissent's Concerns in *Lindsey*

Landlord applying to evict residential tenant is not calling Herbert von Karajan to conduct Berlin's Philharmonic in Chopin's *Les sylphides* and conjure a bevy of sylphs to float tenant to better yet cheaper housing. He asks *state* court to order *state sheriff armed with guns (usable if resistance is perceived) to forcibly enter tenant's home and put her and her effects out on a public street.*[1] "Vacate first, litigate later" is "shoot first, ask questions later." Respondent makes it *in effect* "Dr. Faltas must vacate but *never* litigate."

A. SC's RLTA CANNOT LEGITIMATELY MANDATE PAYMENT OF FAIR-MARKET RENT YET SUBJECT THE VERY TENANT WHO OBEYS THAT PROVISION TO EVICTION.

Justice Brennan wrote in *Lindsey v. Normet,* 405 U.S. 56, 91-2, 92 S.Ct. 862, 883 (1972):

> This constitutional issue is ripe for decision if, and only if, Oregon law (1) recognizes substantive rights of the tenant based on the landlord's breach of duty; (2) recognizes, because of such breach, that a tenant may remain in possession while withholding rent during the term or may hold over after expiration of the term, and (3) excludes the assertion of these rights to continued possession as a defense to an FED action.

His dissent correctly gave *a conjunction of provisions* that would render FEDs unconstitutional. Oregon did not have *that conjunction. Nor does SC's law as written.* But Mag. Newsom and Judge Barber *totally* separated Tenant's right to litigate fair market value from her right to defeat Landlady's February 2005 purported 30-day notice as (1) not permitted by §27-40-710(b) since her *standing contractual rent* had theretofore been *timely* paid *in full* and §710(b) applies only "if rent is unpaid when due and the tenant fails to pay rent within five days from the date due," and

[1] People may die during sheriffs' enforcement of civil matters; *e.g.,* the underlying facts of *Jinks v. Richland County, S.C.,* 538 U.S. 456, 123 S.Ct. 1667, 155 L.Ed.2d 631 (2003).

(2) sent in bad-faith attempt to circumvent §27-40-310(b)'s mandate that "in absence of agreement" (meaning absence of a lease or absence of meeting of minds subsequent to a lease) "the tenant ***shall*** pay as rent the fair market rental value for the use and occupancy of the dwelling unit."

In affirming them, SC's Supreme: (1) gave an unconstitutional reading ***as selectively applied to Dr. Faltas*** and (2) facilitated rent gouging: **"tenant *shall*"** not **"may"** is used to avoid enough tenants caving in to landlords, thus causing prevailing rent to rise *artificially* above its true economic worth.

SC RLTA is a compact wherein SC's Legislature enlisted SC's residential tenants to ensure safety of rental dwellings and absence of rent gouging. Thus, SC's courts must *inter alia* protect each SC residential tenant who honors the compact by complaining of unsafe conditions and/or by refusing to pay above-fair-market-rent even if landlord threatens with eviction.

B. SC's RLTA CANNOT LEGITIMATELY CREATE AN *IRREBUTTABLE* PRESUMPTION THAT *EVERY* 30-DAY NOTICE IS GIVEN IN GOOD FAITH AND ENFORCEABLE.

The *Normet* Court wrote at 92 S.Ct. 874 and 876, respectively:

> Decent, safe, and sanitary housing [is important]. But .... assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions. ***** [If] a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require state to provide appellate review .... [But] when an appeal is afforded, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause.

Justice Douglas' concurrence and dissent added at 92 S.Ct. 878 *et* 882-3, respectively:

> It is an invidious discrimination at which the Equal Protection Clause is aimed for a legislature to select one class of appellants who seek to retain possession of property and place a more onerous condition on their right to appeal than is placed on others like appellants.

> ***** State may bifurcate trials, deciding, say, the right to possession in one suit and the right to damages in another. [citations] But where the right is so fundamental as tenant's claim to his home, the requirement of due process should be more embracing. In ... modern ... life, the home, even if it be in the slums, is where man's roots are. To put him on the street when the slum lord, not the slum tenant, is the real culprit deprives the tenant of a fundamental right without any real opportunity to defend. Then he loses the essence of the controversy, being given only empty promises that somehow, somewhere, someone may allow him to litigate the basic question in the case.

SC's Legislature *elected* to let tenant defend and counterclaim in one trial. *Vide infra*. While the *Normet* Court invalidated Oregon's double-bond requirement to appeal FEDs, it allowed expedited FEDs *if state legislature so chose*. SC's Legislature did **not** choose to expedite residential tenants' eviction appeals *in general*. But, here, SC's Supreme specifically halved Tenant's time to brief and *effectively* eliminated her and her mother's right to counsel.

Irrebuttable presumptions are unconstitutional. But Mag. Newsom and Circuit Judge Barber *totally* relied on fact that **"30-day notice to move"** was given *even though it was later rescinded in writing* (R pp 79, 197) *and by actions* (R pp 198-9).

Tenants *repeatedly* sought to show that purported notice was impermissible *ab initio* and in bad faith anyway but were *totally* denied any chance to do so. (R pp 76-91, 135-42, 184-6, *etc.*)

C. AN *IRREBUTTABLE* PRESUMPTION THAT *EVERY* 30-DAY NOTICE IS GIVEN IN GOOD FAITH AND ENFORCEABLE IMPAIRS OTHER LAWS AND MAY PROMOTE CRIME.

Like most equality laws, SC's FAIR HOUSING LAW, §§31-21-10, *et seq.*, bans discrimination in "terms, conditions or privileges," *e.g.*, higher rent or fewer repairs, both alleged against Respondent (R pp 23, 195-7), not just refusal to rent, §31-21-40 (1 and 2), by any one who owned "three or more single-family houses *at any one time*," §31-21-70(B)(1). If judicially-noticeable public records show Land-

lady within SC's Fair Housing Law's reach, her purported "30-day notice" should be strictly scrutinized, specially given her contradictory statements at R p 118 (22 March 2006 magistrate court hearing). Here, because she was summarily evicted, Tenant never had an opportunity to show that Landlady was charging above-fair-market rent.

D. THE LAW IN OTHER STATES WHICH ADOPTED URLTA SUPPORTS *Tenant.*

1. Alaska Law

So explained a Supreme Court in *Vinson v. Hamilton,* 854 P.2d 733, 736 (Alaska 1993):

> *McCall* may deprive month-to-month tenants of some defenses [but] does not eliminate *all* of them[;] we made only *one* defense unavailable to a month-to-tenant: that of landlord's waiver through acceptance of late rent. *McCall*, 556 P.2d at 540. In ... *any* action for possession, tenant may raise the defense that landlord had terminated lease in retaliation for the tenant's assertion of his rights under the law or ... rental agreement. [Alaska statute]
>
> Even month-to-month tenant may raise a defense of retaliatory eviction. *McCall* [at] 539-40; *see also Edwards v. Habib,* 397 F.2d 687 [699-702] (DC Cir. 1968), *cert. denied,* 393 U.S. 1016 (1969); *Barela v. Superior Court,* 636 P.2d 582 [586-87] (Cal. 1981). Otherwise, these tenants would not assert their rights under their leases and under the law, rightfully fearful that landlords would evict them in consequence. Such a result would frustrate public policy. [italics in original, underlining added]

Chilton-Wren v. Olds, 1 P.3d 693, 698 (Alaska 2000), revisited tenants' rights in Forcible Entry and Detainer (FED) case (equivalent to SC eviction) and concluded:

> Tenant should not be forced to choose between being evicted from her home but preserving her right to seek monetary damages or retaining possession of her home but forfeiting recovery of her damage claims.

2. Arizona Law.

State v. Main, 764 P.2d 1155 (Ariz. App. 1988), generally supports Tenant's contention that Fourth Amendment protects a tenant's rented home on par with owned ones.

3. Florida Law.

Roundtree v. Smith, 448 So.2d 1252 (Fla. App. 4 Dist. 1984), generally held that meaning of contract, which is ambiguous as to expiration date, should have been determined by fact finder. *Ruotal v. Ottati,* 391 So.2d 308 (Fla. App. 4 Dist. 1980), generally held that coerced eviction is constructive eviction and entitles tenant to damages.

4. Hawaii Law.

City and County of Honolulu v. Midkiff, 616 P.2d 213 (Hawaii 1980), *City and County of Honolulu v. Toyama,* 598 P.2d 168 (Hawaii 1979), *Lau v. Bautista,* 598 P.2d 161 (Hawaii 1979), and *Island Holidays v. Fitzgerald,* 574 P.2d 884 (Hawaii 1974), generally held summary judgment inappropriate in circumstances resembling this case.

5. Montana Law.

Whalen v. Taylor, 925 P.2d 462 (Mont. 1996), held *inter alia*: if statute allows tenant to maintain/regain possession due to past event, he must be given possession even if landlord threatened *new* "30-day notice to move" under a "homestead exemption" theory. It answers Mag. Newsom's reasoning at the 10 May 2006 Hearing, *supra*.

Mag. Newsom also read one sentence out of context. The whole §27-40-710(b) is *clearly* limited to notice to pay the rent within five days from when it is due or demanded:

> (b) *If rent is unpaid when due and the tenant fails to pay rent within five days from the date due* or the tenant is in violation of Section 27-40-540, the landlord may terminate the rental agreement *provided the landlord has given the tenant written notice of nonpayment* and his intention to terminate the rental agreement if the rent is not paid within that period. The landlord's obligation to provide notice under this section is satisfied for any lease term

after the landlord has given one such notice to the tenant or if the notice is contained in conspicuous language in a written rental agreement.

To apply this provision to *grounds for ejectment other than non-payment of rent* is to keep a tenant who remedied a violation within the statutory 14 days, or one whose plans to voluntarily move change, in fear of a sheriff's knock. This is not and cannot be the law. Nor did Tenant claim the law *permanently* bars a landlord who once demanded a rent increase from *ever* seeking ejectment of his tenant.

The test is good faith in giving the notice and in seeking the ejectment. Motives and intents are classic jury questions; but no trial was held because of Mag. Newsom's erroneous grant of summary judgment to Landlady.

6. New Mexico Law.

Ramirez-Eames v. Hover, 775 P.2d 772 (N.M. 1989), held $125/month above-fair-market rent to be inequitable and thus unenforceable under New Mexico Law.[2] The *Ramirez-Eames* Court held that statute's mandate of "fair market rent" is *permissible* price control. Ramirez-Eames was charged 17% over fair-market rent. The house at issue is worth only $645/month and Landlady affied to knowing *at the outset* of Dr. Faltas' "breathing problems" and of her mother's age. She charged them more than prior tenants.

"Inequitable" differs in degree from "unconscionable." *SC's RLTA emphasizes "fair market rent" more than other states'*. Landlady's war to evict Tenant who refused $895/month (39% over fair-market), Landlady's ever-shifting pretexts' disingenuousness and her lawyers' attacks on disabled Tenant, take case from "inequitable" to "unconscionable."[3]

By *joint* operation of several provisions, SC's Legislature guaranteed every SC residential tenant (1) ten days (longer

[2] To determine how substantial the excess is, it need be multiplied it by the life of the tenancy. So, a one month $150 difference amounts to **nine thousand dollars in five years.**

[3] *New* pretext that Landlady never wanted an over-fair-market rent, only her house back, *after twice having written the opposite*, is like trying *to become* a virgin after having delivered twins.

than FED times in other states) to respond, (2) trial by jury (emphasized *twice*) if timely sought, (3) right to fully and fairly litigate all her *defenses and counterclaims* **in *one* procedure,** (4) right to stay in possession while litigating, and retain it if she prevails on, fair-market rent, and (5) right to maintain possession during *meaningful* appellate review if she posts rent bond. **But all of it becomes dead letter if landlord can simply give defiant tenant a 30-day notice to move and tenant gets summarily evicted without a chance to assert defenses.**

7. Oregon Law.

Supportive is *Amatisto v. Paz*, 728 P.2d 42, 46 (Or. App. 1986):

> The idea behind [Oregon's] statutory scheme [like SC's RLTA] is to allow tenant to get needed repairs without having to move. If she thinks she has a valid claim, she should not risk losing possession in the event she is wrong.

Please see also *Napolski v. Champney*, 667 P.2d 1013 (Or. 1983) (same); *L&M Investment Co. v. Morrison*, 594 P.2d 1232 (Or. 1979) (phone to landlord sufficed to put him on notice and trigger protections against retaliation), *Reeves v. Baker*, 530 P.2d 30 (Or. 1974) (*generally*, acceptance of rent reinstates lease), and *Fitzpatrick v. Robbins*, 626 P.2d 910 (Or. App. 1981) (substantial alteration of lease terms after tenant takes possession impermissible without her consent and may be outrage.) Against "free market" demagoguery, the *Marquam Investment v. Beers*, 615 P.2d 1064, 1074 (Or. App. 1980), court relied on *Brewer v. Erwin*, 600 P.2d 398, to uphold Oregon's RLTA as constitutional:

> We find the distinction between landlords and tenants ... rational and constitutional. [T]he legislature could have rationally distinguished between residential landlords and their tenants because of the disparity in bargaining power, and the particular, personal significance of residential housing to tenants.

SC's RLTA is more tenant-favorable and fair-market-emphatic than other States' modifications of URLTA. That proves SC's Legislature knew the "disparity in bargaining

power between residential landlords and their tenants" to be starkest in SC and apportioned remedies and obligations accordingly. *Marquam* and a correct reading of SC's RLTA support Tenants' stance, at R pp 136, 166 lines 7-13, that the law distinguishes between stronger side and weaker side to contract and gives more rights to the weak.

Respondent's speeches masquerading as a legal/economic logic (parroted by jurists) pose evident danger in other-than-rent-value scenarios: Does "free-market" allow landlord to ask month-to-month tenant for sexual favors or he gives her "30-day notice to move"? Does he have *further* "free-market" right to have her procure drugs for him or get evicted? Clearly, good faith must be tested *if challenged*.

Good faith is a *sine qua non* prerequisite for "30-day notice" to satisfy RLTA. A bad faith notice has no more legal effect than fraudulent property transfer. Courts would never enforce it.

Landlady's bad faith is clear in her letters seeking substantially above what *she knew to be above fair market rent.* (R pp 71-72, 193-4, 201-5) They create against her a presumption to defeat before a jury.

II. To Give Guidance on Issues Affecting one Third of the Nation And Representing an Important Element of Civil Rights

Eviction, whereby the sheriff (a state agent) enters a tenant's housing, seizes *all her "papers, and effects"* and puts them out on the street is *the ultimate* "search and seizure." Landlord who invokes State's power to have its sheriffs evict tenant from her home seeks drastic government termination of her peace and privacy rights in said home.

Clear and convincing proof is required when government seeks to take unusual coercive action—more dramatic than entering an award of money damages or other conventional relief—against an individual; *Santosky v. Kramer,* 455 U.S. 745, 756 (1982) (termination of parental rights); *Addington v. Texas,* 441 U.S. 418 (1979) (involuntary commitment); *Woodby v. INS,* 385 U.S. 276 (1966) (deportation); *Schneiderman v. U.S.* 320 U.S. 118 (1943) (denaturalization).

SC's Legislature conditioned state's willingness to take the unusual coercive act of ejecting tenant at landlord request on landlord's good faith compliance with all prerequisites of an application for ejectment. *Vide* §§ 27-40-210 (4, 5) (general definitions) and 220 (obligation of good faith).

Also, equality is expressed in the federal statutes of equal employment and educational opportunities. Prohibition of discrimination and retaliation in housing (specially rental) is as necessary as in employment and education. It may be plausibly argued that employment and educational opportunities are contingent on adequate housing. And the current mortgage foreclosure crisis can only increase the portion of Americans who rent rather than own.

After *Lindsey, supra,* deferred to state legislatures, many legislatures acted either by adopting URLTA or enacting their own laws. But SC's Supreme's opinion sought to be reviewed effectively destroyed half-a-century of progress.

It is respectfully suggested that this Court graft its Title VII and First Amendment jurisprudence, with shifting burdens scheme, to the area of retaliatory and/or discriminatory increase in rent or refusal to renew lease.

III. The South Carolina Supreme Court's Decision is In Conflict with a Decision of this Court.

SC's Supreme's *Patel v. Patel,* S.E. 2d 114, 118 (S.C. 2004) cited in the opinion sought to be certified, is in *express* conflict with this Court's *Liljeberg v. Health Services Acquisition Corp.,* 486 U.S. 847 (1988). In essence, SC requires a litigant to *prove* that the coin landed on its head because it had two heads *without ever being allowed to see the coin.*

Actual bias is a judge's state of mind to which a litigant has no direct visual access specially where a decision can justifiably go either way. For it can always be argued that the coin landed on its head because a fair coin has a 50% chance of landing on its head. The question should not be whether the coin *could have validly landed head-up* **but whether it had an equal chance of landing tail up.**

The test should not be whether a judge's decision can be justified *after the fact*, but whether, *before the decision*, the judge was equally open to rule for either side.

This Court recently granted *certiorari* in *Caperton v. Massey* to decide the due process implications of state judges' refusal to recuse. This case is respectfully suggested to be consolidated with *Caperton* or held in abeyance pending the *Caperton* decision.

Conclusion

Order finds no refuge in a jurisprudence of conflict. The writ should be granted or the case should be decided in light of *Caperton*.

13 February 2009

Respectfully submitted
Orin G. Briggs,
Counsel for Petitioner
304 Byron Road, #3
Columbia, SC 29209

Appendix A [Opinionsbelow]

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sharon B. Koon, Respondent,

v.

Soraya Farid Fares and
Dr. Marie A. Faltas, Appellants.

Appeal from Richland County
James R. Barber III, Circuit Court Judge

Opinion No. 26532
Submitted June 26, 2008 - Filed August 18, 2008

AFFIRMED

Marie A. Faltas, M.D. and Soraya Farid Fares, both of Columbia, *pro se.*

Charles E. Carpenter, Jr. and Carmen V. Ganjehsani, both of Carpenter Appeals and Trial Support, of Columbia, and J. Thomas Falls, Jr., of West Columbia, for Respondent.

CHIEF JUSTICE TOAL: In this case, the magistrates court granted summary judgment to Respondent landlord ("Landlord") in an eviction action, finding that Landlord had given Appellants, who are tenants ("Tenants"), proper notice of the termination of their tenancy. The circuit court affirmed and Tenants appeal. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

In August 2002, Landlord and Tenants entered into a residential lease agreement for a house owned by Landlord. The agreement included the following provision:

> This Lease Agreement shall be effective for a term of 12 months, beginning on the 7th day of August, 2002, and ending on the 6th day of August, 2003 after which tenants may continue month to month. Tenant shall provide a 30 day written notice prior to moving (emphasis in original).

When the term of the original lease expired in August 2003, Tenants continued to rent the residence at the $795 per month rate specified in the original term of the lease. In November 2004, Landlord indicated her intent to increase Tenants' monthly rent by $100 beginning in 2005. Tenants expressed to Landlord that they would not pay the in-creased rate. Subsequently, in early February 2005, Landlord notified Tenants in writing that she was raising the rent to $895 effective February 15, and that if Tenants did not wish to rent the property at that rate,

then the writing served as their thirty-day notice to vacate the premises by March 15.

After further communications, the parties agreed that Tenants could remain at Landlord's rental property until August 9, 2005 at a rate of $795 per month. At some point after the March agreement, the relationship between the parties apparently took a turn for the worse and in July 2005, Tenants confirmed in a written notice that they would not be leaving the premises in August, and further, that until they gave Landlord a new thirty-day notice of termination, Tenants would be reducing their rental payments to reflect what they believed to be the fair market value of the rent "abated by the diminution of the quiet enjoyment caused by [Landlord's] actions and failures."

On January 5, 2006, Landlord sent a letter to Tenants requesting past due rent totaling $300 over a period of three months and explaining that Landlord was "still patiently waiting for you to move." Landlord noted that the lease had expired, Tenants had been asked to move, and Tenants had given a letter of intent to move. Landlord concluded that "it is still our wish for you to move from our property as you promised that you would in your letter of March 15, 2005." After no response from Tenants, Landlord filed an application for ejectment based on (1) Tenants' failure to pay rent when due, (2) expiration of the term of the lease, and (3) Tenants' violation of the terms of the lease. *See S.C.* Code Ann. § 27-37-10(a) (2007). The magistrates court served a rule to vacate or show cause on Tenants on February 16, 2006.

At a hearing requested by Tenants, Tenants asserted a counterclaim that Landlord was unfairly charging Tenants rent above the fair market value in violation of S.C. Code Ann. § 27-40-310(b) (2007), and requested a jury trial. Prior to trial, however, the magistrate granted Landlord's motion for summary judgment and ordered the eviction of Tenants, finding that the term of the original lease had expired and that Landlord had given Tenants the statutory 30-day notice to leave. *See S.C.* Code Ann. § 27-40-770(b) (2007). The magistrate further held that this resolution of Landlord's claim precluded consideration of Tenants' issue related to rent inflation.

Tenants appealed and the circuit court affirmed the magistrate's gram of summary judgment to the Landlord.

Tenants appealed the circuit court's order to the court of appeals, and Landlord moved to certify the case to this Court pursuant to Rule 204(b), SCACR. This Court granted Landlord's motion, and Tenants raise the following issues for review:

I. Did the circuit court err in affirming the magistrate's grant of summary judgment to Landlord based on a finding that Landlord provided the proper notice for terminating the tenancy established by the lease agreement?

II. Did the circuit judge err in failing to recuse himself in this matter?

III. Should eviction proceedings require a court to find at least "clear and convincing proof" of a tenant's breach of a lease agreement?

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Houck v. State Farm Fire & Cas. Ins. Co.*, 366 S.C. 7, 11, 620 S.E.2d 326, 329 (2005).

LAW/ANALYSIS

I. Summary judgment in Landlord's eviction action

Tenants argue that the circuit court erred in affirming the magistrate's grant of summary judgment to Landlord because the lease agreement signed by the parties only provides for the termination of the lease by Tenants, and therefore, Landlord did not have grounds for eviction. We disagree.

The purpose of the rules of contract construction is to ascertain the intention of the parties as gathered from the contents of the entire document and not from any particular provision within the contract. *Litchfield Co. of S.C., Inc. v. Kiriakides*, 290 S.C. 220, 223, 349 S.E.2d 344, 346 (Ct. App. 1986). Where one interpretation of a contract makes it unusual or extraordinary and another interpretation, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction prevails. *Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 434 (1975).

An interpretation which establishes the more reasonable and probable agreement of the parties should be adopted

while an interpretation leading to an absurd result should be avoided. *Id.*

Under Tenants' interpretation, Tenants leasehold estate essentially trumps Landlord's fee simple interest in the residence and gives Tenants a perpetual tenancy in the rental property. We find that this is an absurd result that could not have possibly been intended by Landlord when she agreed to rent the residence. Rather, under the terms of the agreement, Landlord and Tenants created a month-to-month tenancy when the term of the original year lease expired in August 2003. *See also* S.C. Code Ann. § 27-35-30 (2007) (providing that tenancies of real estate other than agricultural lands shall be deemed from month to month unless there otherwise agreed). A landlord or tenant may terminate a month-to-month tenancy by a written notice at least thirty days before the termination date specified in the notice. S.C. Code Ann. § 27-40-770(b). To this end, Tenants argue that they did not receive proper notice of termination from Landlord. We disagree.

The Residential Landlord and Tenant Act which governs the lease agreement provides that a person gives notice to another "by taking steps reasonably calculated to inform the other in ordinary course whether or not the other actually comes to know of it." S.C. Code Ann. § 27-40-240(b) (2007). A person has notice of a fact if "from all the facts and circumstances known to him at the time in question he has reason to know that it exists." S.C. Code Ann. § 27-40-240(a)(3) (2007). The record reveals that Landlord instituted multiple notices to Tenants, beginning at least with the February 2005 letter, expressing Landlord's desire to terminate the rental arrangement. Despite Landlord's desire to stop leasing the premises to Tenants, Landlord agreed the following month to permit Tenants to continue renting the premises until a specific date that Tenants stated was convenient for them to move. It was only after Tenants revealed their intentions to take advantage of Landlord's generosity by refusing to leave the premises on the specified date and establishing their own terms of rental that Landlord sent a final written notice of termination in January 2006 and brought the present action one month later.

For these reasons, we find that the parties' lease agreement established a month-to-month tenancy for which Landlord provided proper notice of termination to Tenants and that Tenants' further occupancy after August 9, 2005, constituted

proper grounds for eviction. Accordingly, we hold that the circuit court properly affirmed the grant of summary judgment to Landlord.

II. **Recusal**

Tenants argue that the circuit court judge erred in declining to recuse himself in this matter. We disagree.

A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including instances where he has a personal bias or prejudice against a party. *Patel v. Patel*, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004) (citing Rule 501, SCACR, Canon 3(E)(1)(a)). It is not sufficient for a party seeking disqualification to simply allege bias; rather, the party must show some evidence of bias or prejudice. *Id.* If there is no evidence of judicial bias or prejudice, a judge's failure to disqualify himself will not be reversed on appeal. *Id.*

Tenants' dramatic recitation in their brief alleging that Judge Barber's order "stems from his subconscious and irremediable bias" against Tenant Faltas is completely unfounded. Tenants moved for the judge's recusal based solely on a perceived bias from the fact that Judge Barber had ruled against Tenant Faltas in a previous matter. We find nothing disingenuous in Judge Barber's explanation that he routinely heard cases involving parties who had previously appeared in front of him and that this did not affect his ability to remain neutral. Furthermore, Tenants fail to point this Court to any evidence in the record showing actual bias or prejudice on the part of the judge. Instead, the record displays a trial court order that accurately cites the applicable law and reaches a sound conclusion based on application of the law to the facts on the record in this case. *See id.* (acknowledging that a judge's impartiality might reasonably be questioned when the record does not support the judge's factual findings). Accordingly, we hold that the circuit court judge properly denied Tenants' motion for recusal.

As to Tenants' allegations of Judge Barber's *ex parte* communications with Landlord's counsel as a basis for recusal, we find that in the first instance, these matters are not preserved for review because they were not raised to or ruled upon either at trial or in Tenant Faltas' Rule 59(e) motion. *See I'On, LLC v. Town of Mount Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding that an issue not raised to and ruled upon by the lower court is not preserved for appellate review).

Turning to the merits, we uphold the validity of Judge Barber's order and find nothing to suggest that the alleged *ex parte* communication prejudiced Tenants in any way. *See Burgess v. Stern*, 311 S.C. 326, 331, 428 S.E.2d 880, 884 (1993) (adopting a subjective approach to reviewing orders potentially infected by *ex parte* communications). In his order denying rehearing, Judge Barber provided a detailed description of the circumstances underlying the alleged ex parte communication which, in our view, amounts to Landlord's counsel's failure to observe Rule 5(b)(3), SCRCP (requiring counsel to serve copies of proposed orders on all counsel of record) and no impropriety on Judge Barber's part. Judge Barber explained that the trial court's order was already being drafted when the order drafted by Landlord's counsel was received and that counsel's draft order did not influence the trial court's final decision. Further considering that the trial court's order exhibits sound legal reasoning based on applying the law to the facts on the record, we simply can find no basis for invalidating Judge Barber's order. For these reasons, we uphold the validity of the circuit court's order and we affirm the circuit court judge's refusal to recuse himself.

III. **Burden of proof in eviction proceedings**

Tenants argue that because of the constitutional implications of seizing a person's "home," eviction proceedings require a court to find at least "clear and convincing proof" of a tenant's breach of a lease agreement. We find that this issue is not preserved for review because it was not raised to or ruled upon at trial or in Tenant Faltas' Rule 59(e) motion.] *See I'On*, 338 S.C. at 422, 526 S.E.2d at 724.[1]

CONCLUSION

For the foregoing reasons, we affirm the grant of summary judgment to Landlord in this matter.

MOORE, WALLER, PLEICONES and BEATTY, JJ., concur.

---

[1] To the extent that Tenants' argument on the standard of proof for eviction proceedings segues into an argument that they were entitled to a jury trial on their counterclaims alleging Landlord charged a rental rate above fair market value, we disagree. Tenants' claim of an excessive rental rate is based on S.C. Code Ann. § 27-40-310 which provides that "[i]n the absence of an agreement, the tenant shall pay as rent the fair-market rental value for . . . the dwelling unit." Because the magistrate found that an agreement existed between the parties which established a month-to-month tenancy at $795 per month, this statutory provision is inapplicable and therefore, a jury's factual determination of the fair-market rental value is irrelevant.

THE SUPREME COURT OF SOUTH CAROLINA

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA SOUTH CAROLINA 29211
(803) 734-1080
FAX (803) 734-1499

September 18, 2008

Marie A. Faltas, M. D.
436 Byron Road
Columbia, SC 29209

Re: Sharon B. Koon v. Soraya Farid Fares and Dr. Marie A. Faltas

Dear Dr. Faltas:

The Court has issued the following order on your Petition for Rehearing and for the Petition to be heard on Oral Arguments:

"Petition for rehearing is denied.
Petition to be heard on oral arguments is denied."

s/ Jean H. Toal	C.J.
s/ John H. Waller, Jr.	J.
s/ Costa M. Pleicones	J.
s/ Donald W. Beatty	J .
s/ James E. Moore	A.J.

September 18, 2008."

The remittitur is today being forwarded to the lower court.

Very truly yours,
s/ Daniel E. Shearouse CLERK

DES/jjp
cc: Ms. Soraya Farid Fares
Charles E. Carpenter, Jr., Esquire
Carmen V. Ganjehsani, Esquire
J. Thomas Falls, Jr., Esquire

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE CIRCUIT COURT
CA NO.: 2006-CP-40-2786

Sharon B. Koon,
Plaintiff,
v.
Soraya Farid Fares and Dr. Marie Faltas,
Defendants.

ORDER

This matter came before the Court on January 3, 2007 on appeal from the Dentsville Magistrate's granting of Summary Judgment on Landlord's application for eviction of Tenants. After hearing oral arguments and reviewing the record and applicable law, I affirm.

FINDINGS OF FACT

On July 26, 2002, Dr. Faltas and Ms. Fares ("Tenants") entered into a lease agreement with Ms. Koon ("Landlord") to lease the premises located at 436 Byron Rd., Columbia, SC 29209 for $795.00 per month. It is undisputed that there was a 12 month lease agreement to provide for rent entered into between the parties that became effective beginning August 7, 2002 and ending August 6, 2003. Following the expiration of the 12 month lease agreement, the lease became month to month. On February 6, 2005, Landlord notified Tenants by mail that the monthly rent would increase by $100 and that if the increase was not acceptable, "please consider this your 30 days notice to move." Landlord sent a second letter dated February 10, 2005 informing Tenants of their "30 day notice to move" and further stating that "the property must be vacated by March 15, 2005.

Tenants responded with a letter to Landlord dated March 2, 2005 which stated "we are offering to continue at the present rent...and move out in August 2005." In a second letter dated March 15, 2005, Tenants stated, "[p]lease consider this my notice, God willing, I will have moved out of the house we are renting from you by 9 August 2005."

The letter further stated "please consider this my notice to move by 9 August 2005." However, Tenants failed to remove themselves from the premises at that time whereupon the Landlord filed an Application for Ejectment. In response, Tenants filed a counterclaim alleging the Landlord charged more than the "fair market value" of the rental property.

Prior to the trial in Magistrate's Court, Landlord moved for Summary Judgment, which was heard by Judge Newsom on

May 10th 2006. At that hearing, Judge Newsom ordered the Defendants evicted because the term of the lease had expired and she had been given notice to leave as required by law. Judge Newsom did not consider the issues raised by Defendant as to whether or not the amount of rent Defendants were paying was "fair market value" because he found it indisputable that Defendants had received notice of termination of the lease agreement.

Tenants raise several issues on appeal. Primarily, Tenants argue they had the exclusive right to terminate the lease agreement and that Magistrate Newsom erred in refusing to allow a jury to determine the "fair market value" of the rent. This Court disagrees and upholds the granting of Summary Judgment by the Magistrate Court.

STANDARD OF REVIEW

The standard of review to be applied by a Circuit Court on appeal from a magistrate's judgment is prescribed by § 18-7-1700 of the South Carolina Code of Laws:

> "Upon hearing the appeal the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. In giving judgment the court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all the parties and for errors of law or fact."

Moreover, the Court has been asked to review the granting of summary judgment by the magistrate's court. Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c) SCRCP. In addition, "[i]n determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the party opposing summary judgment." Bruce v. Durney, 341 S.C. 563, 534 S.E.2d 720 (S.C. App. 2000).

LAW/ANALYSIS

I. A month-to-month tenancy was expressly created by the terms of the Lease Agreement and by operation of law.

Paragraph 5 of the residential Lease Agreement states,

> This Lease Agreement shall be effective for a term of 12 months, beginning on the 7th day of August, 2002, and ending on the 6th day of August, 2003 after which tenants may continue month to month. Tenant shall provide a 30 day written notice prior to moving.

Tenants argue, under the language set forth above, the lease expressly gives the tenant alone the right to terminate the lease. Tenants further argue they are entitled to a jury determination of the fair market value of the rent. They apparently rely on §27-40-310(b) for the proposition that their right to a jury determination of fair market rental value is absolute. §27-40-3 10(b) states, "(b) **In absence of agreement,** the tenant shall pay as rent the fair market value for the use and occupancy of the dwelling unit." (Emphasis added). These arguments are without merit.

First, the plain language of the lease clearly establishes a tenancy for one year that converts to a month-to-month tenancy. Moreover, there was clearly an agreement between the parties as evidenced by the signed lease agreement. Neither the Tenants nor the Landlord elected to terminate the lease immediately following the initial 12 month term and, at that point, the tenancy became month to month until either party gave notice to terminate the tenancy, or a new lease agreement was signed. Moreover, there is no evidence to suggest the agreement was anything other than an arm's length transaction between the parties.

Second, taking Tenant's argument to its natural conclusion means that Tenants would, in effect, have ,the unqualified right to a perpetual tenancy. This would completely frustrate the Landlord's rights with respect to her property interest and her property could forever be held hostage to the whims of the tenant. This would create an absurd result.

"Common sense and good faith are the leading touchstones of the construction of a contract and contracts are to be construed so as to avoid an absurd result. Where one construction would make a contract unusual or extraordinary and another, equally consistent, would make the contract reasonable, fair, and just, the latter construction will prevail." Georgetown Mfg. & Warehouse Co. v. South Carolina Dep't of Agric., 301 S.C. 514, 518 392 S.E.2d 801 (S.C. App. 1990). Moreover, common sense dictates that no Landlord would surrender the right to terminate a lease and allow the Tenant to be the sole determiner of when, if ever, the Landlord would be allowed to repossess their property.

II. **Tenants were properly notified of the termination of the month-to-month tenancy.**

§27-40-770(b) states: "The landlord or the tenant may terminate a month-to-month tenancy by a written notice given to the other at least thirty days before the termination date specified in the notice." Magistrate Judge Newsom found that "[t]he testimony showed that [Landlord] gave written notice on 3 (three) occasions for [Tenants] to move out. 1) February 2005, 2) August 2005, and 3) January 2006." The Judge further found that "it was an indisputable pointed fact that [Tenants] had been given notice" to leave the residence as required by law. Based on the record and oral arguments at the hearing, I find that adequate notice was given as required by law.

III. **The return filed by the Dentsville Magistrate's Court is sufficient as required by S.C Code of Laws § 18-7-60.**

The Tenants also took issue with the return provided by the Dentsville Magistrate. More specifically, Tenants assert the magistrate's return was defective because there was no record made of the hearing by a court reporter and, as such, failed to comply with S.C. Code Ann. § 18-7-60. I disagree.

When a party appeals to the Circuit Court from a magistrate court order, the magistrate court "shall thereupon, after ten days and within thirty days after service of the notice of appeal, make a return to the appellate court of the testimony, proceedings and judgment and file it in the appellate court." S.C. Code Ann. §18-7-60 (1985). If the return is deemed defective, "the appellate court may direct a further or amended return as often as may be necessary and may compel a compliance with its order." I do not believe the return to be defective. The return was made within the time specified by statute. Although a transcript of the hearing was not made by a court reporter, I do not believe this is fatal to the sufficiency of the return made.

CONCLUSIONS OF LAW

Based on the aforementioned facts and legal analysis, the Court makes the following conclusions of law:

1. A month-to-month tenancy was expressly created by the terms of the Lease Agreement and by operation of law.
2. Tenants were properly notified of the termination of the month-to-month tenancy.
3. The Court finds that the return filed by the Richland County Magistrate's Court is sufficient as required by S.C Code of Laws § 18-7-60.

ACCORDINGLY, IT IS ORDERED that the granting of Summary Judgment by the Richland County Magistrate in favor of the Landlord is hereby affirmed and that the defendants be evicted from the premises.

s/ Honorable James R. Barber, III
Circuit Court Judge
Fifth Judicial Circuit

STATE OF SOUTH CAROLINA **IN THE CIRCUIT COURT**
COUNTY OF RICHLAND **C/A NO.: 2006-CP-40-2786**

Sharon B. Koon,
Plaintiff,
v.
Soraya Farid Fares and Dr. Marie Faltas,
Defendants.

ORDER DENYING DEFENDANT FALTAS' MOTION TO ALTER OR AMEND

This matter comes before the Court pursuant to Defendants' Rule 59(e) Motion or Alter or Amend the Court's Order. After considering the issues raised in Defendant Faltas' Motion, I am denying the motion.

Defendant Faltas' motion is based on her belief that the Court's ruling was controlled by errors of law and fact. This belief is primarily based on the following grounds:

1. Judge Barber should have recused himself because of his "subconscious bias against [Defendant] Faltas." Appellant's Motion to Alter or Amend, pg. 1.
2. Order issued by the Court "should be withdrawn as infected by ex parte communication" Id. by Plaintiffs counsel.

I. RECUSAL OF JUDGE BARBER

Defendant Faltas alleges in her Rule 59(e) motion that Judge Barber should have recused himself from this matter because of a subconscious bias against Defendant Faltas. More specifically, Defendant Faltas' allegations of bias are based on the ruling of the Court. The Court holds this argument is without merit and affirms its decision to eschew recusal.

Canon 3(E)(1)(a) of the Code of Judicial Conduct requires a judge to recuse himself when "the judge has a personal bias or prejudice concerning a party..." Our Court of Appeals has held "it is not enough for a party seeking disqualification to simply allege bias or prejudice. The party must show some evidence of that bias or prejudice. The alleged bias must stem from an extrajudicial source and result in a decision based on information other than what the judge

learned from his or her participation in the case." State v. Jackson, 353 S.C. 625 627 (S.C. App. 2003). Furthermore, in Payne v. Holiday Towers Inc., 283 S.C. 210 321 S.E.2d 179 (Ct. App. 1984), our Court of Appeals held "when no evidence is presented other than prior appearances by a party which resulted in adverse rulings by the judge, the judge is not required to recuse himself." *See* State v. Cabiness, 273 S.C. 56 254 S.E.2d 291 (1979) (defendant's three previous appearances in General Sessions before same judge not a basis for disqualification, absent other evidence of bias). In the present case, the Court has no bias against Defendant Faltas for any reason. Moreover, Defendant Faltas' accusations of bias are insufficient grounds for recusal as they are merely allegations of bias or prejudice. Defendant Faltas' evidence to support her allegations is based on the Court's ruling in the present case and prior adverse rulings in a prior case. In addition, the Court's ruling in this case is fully supported by the record.

II. *EX PARTE* COMMUNICATION

Defendants further allege the Order submitted by the Court was "infected by *ex parte* communication." More specifically, Defendant Faltas believes the ruling by the Court was in error due to the fact she was not provided a copy of the proposed Order submitted by Plaintiff's counsel at the request of the Court. This Court disagrees. Following the Appeal Hearing, the Judge verbally relayed his ruling to his law clerk and instructed his law clerk to draft an Order consistent with his ruling. The law clerk drafted an Order to this effect.

Thereafter, the Judge sent a letter to counsel for both sides informing them of his decision and requested Plaintiff's counsel to submit a proposed Order. The Court assumed the Order had been forwarded to opposing side prior to being sent to the Judge. When the Court received the proposed Order the Judge gave the proposed order, as well as all other materials pertaining to this case, to his law clerk. The law clerk reviewed the proposed order submitted by Plaintiff's counsel and integrated various portions of the proposed Order into the Order he was preparing at the Court's direction. The Judge never read the proposed order submitted by Plaintiff's attorney. The law clerk and Judge together reviewed the Order prepared by the law clerk.

The Order set forth the Judge's rulings and, as a result, the Order was signed. Moreover, the final Order was not provided to either side prior to being filed with the Clerk of Court.

Defendants also claim the Court either directed or tolerated both his law clerk and administrative assistant to tell inaccuracies to Defendants in an attempt to conceal the Judge's receipt of the proposed Order from the other side. This is incorrect. Defendant Faltas contacted the Judge's chambers on numerous occasions. At no point was the Court's staff directed to misrepresent anything to the Defendant. Nor did staff intentionally or negligently misrepresent anything to the Defendant at any time. At the time of Faltas' many calls, the proposed Order had not yet been received by the Court.

IT IS THEREFORE ORDERED: Defendant Faltas' motion to alter or amend the Court's Order is denied.

S/Judge James R. Barber, III
Circuit Court Judge

April 12, 2007
Columbia, South Carolina

[Magistrate's Return on Appeal to Circuit Court]

This matter was filed February 9th, 2006 based on an application filled out on February 2, 2006 asking for an eviction based 1) the tenant failing to pay rent when due, 2) the term of the lease had expired and 3) the terms of the lease had been violated. The defendant Marie Faltas was served on February 16, 2006 and requested a hearing. It was learned that the defendant Marie Faltas was served but her mother Soraya Farid Fares had not been served as listed and the matter was continued so that the application for ejectment could be filled and served.

This matter was transferred to Dentsville Magistrate based on Order from Judge Womble due to defendant's motion. Dr. Faltas motion to dismiss was heard and denied due to being an issue of fact concerning the amount of rent being paid, and whether or not the amount being paid was fair market value. This hearing was held on March 22, 2006 (See order in file). Dr. Faltas requested a jury trial. The trial was scheduled for May 22nd, 2006. Prior to trial the plaintiff moved for a summary judgement. On May 16. 2006 I heard this motion.

The plaintiff was present as was Dr. Marie Faltas. Soraya Farid Fares never attended any hearing but was represented by her Attorney, Mr. Orin Briggs. At the hearing it was determined that there had been a written lease between the parties that had expired. The lease was for

$795.00 per month. After the lease expired the Plaintiff asked for an increase in rent which the defendant refused to pay. The testimony showed the plaintiff gave written notice on 3 (three) occasions for the defendant to move out. 1) February 2005, 2) August 2005, 3) January 2006.

The testimony showed that the plaintiff was distracted by personal matters and did not force the issue in February 2005. In August of 2005 the defendant requested an extension of time to move due to her own personal issues. The plaintiff agreed. The lease had been month to month tenancy once the written lease had expired. The parties acknowledged that notice was given in January 2006, giving 30 days to move. The defendant refused to leave. The plaintiff filed the eviction.

At the hearing on May 10, 2006, I ordered the defendant evicted because the term of lease had expired and she had been given notice to leave as required by law. I saw no need to consider the issues raised by the defendant as to whether or not the amount of rent she was paying was "fair market value" because I had determined it was an indisputable pointed fact she had been given notice. Dr. Faltas appealed-I ordered her to pay rent of $795.00 a month until the appeal was heard.

s/Judge Phillip F. Newsom, Dentsville Magistrate

Appendix B [Relevant provisions of SC Code of Laws]

§22-3-10 (**"Concurrent Civil Jurisdiction [of Magistrates' Courts]"**) provides:

> 12. In all actions provided for this section when a filed counterclaim involves a sum not to exceed [$7,500] except that this limitation does not apply to counterclaims filed in matters between landlord and tenant and the possession of land.

SC's ejectment statutes and RLTA provide, respectively:

§27–37–10. **Grounds for ejectment of tenant**

> (A) The tenant may be ejected upon application of the landlord – when (1) the tenant fails or refuses to pay the rent when due or when demanded, (2) the term of tenancy or occupancy has ended, or (3) the terms or conditions of the lease have been violated.
>
> (B) For residential rental agreements, nonpayment of rent within five days of the date due constitutes legal notice to the tenant that the landlord has the right to begin ejectment proceedings under this chapter if a written rental agreement specifies in bold conspicuous type that nonpayment of rent constitutes such notice. This requirement is satisfied if the rental agreement contains the notice specified in Section 27-40-710(B).

§27–37–20. **Ejectment proceedings.** Any tenant may be ejected in [this] manner[:] Upon application by the landlord ... any magistrate having jurisdiction shall issue a written rule requiring the tenant forthwith to vacate the premises occupied by him or to show cause within ten days after service of a copy of such rule upon the tenant.

§27–37–60. **Trial of issue.** If the tenant appear and contest ejectment the magistrate shall forthwith hear and determine the case as any other civil case, allowing trial by jury if demanded *by either party*.

§ 27–37–70. **Designation of parties in ejectment.** In any trial before the magistrate in an ejectment case either with or without jury the landlord may be designated as plaintiff and the tenant as defendant.

§ 27–37–80. **Jury trial.** *Either landlord or tenant may demand trial by jury. In such case a jury shall be summoned and a jury trial had as in any other civil case. Upon the testimony offered, under instructions by the magistrate as to the law, the jury shall find for either the landlord or tenant as in any other civil case.*

§27–37–110. **Effect of verdict for defendant.** If the verdict be for the defendant then *the tenant shall remain in possession until* (a) the termination of his tenancy by agreement or operation of law, (b) failure or neglect to pay rent or (c) ejected in *another* proceeding under this chapter or by judgment of a court of competent jurisdiction.

§27–40–210. General definitions. Subject to additional definitions contained in subsequent articles of this chapter which apply to specific articles or parts of this chapter, and unless the context otherwise requires, in this chapter:

(4) "fair-market rental value" means the actual periodic rental payment for comparable rental property to which a willing landlord and a willing tenant would agree. In determining the fair-market rental value, the court may consider appraisals offered by the tenant, landlord, realty expert, licensed appraisers and such other relevant evidence;

(5) "good faith" means honesty in fact in the conduct of the transaction concerned;

§27–40–220. Obligation of good faith. Every duty under this chapter and every act which must be performed as a condition precedent to the exercise of a right or remedy under this chapter imposes an obligation of good faith in its performances or enforcement.

§27–40–310. Terms and conditions of rental agreement. (a) A landlord and a tenant may include in a rental agreement terms and conditions not prohibited by this chapter or other rule of law, including rent, terms of the agreement, and other provisions governing the rights and obligations of the parties. (b) In absence of agreement, the tenant *shall* pay as rent the fair market rental value for the use and occupancy of the dwelling unit.

§27–40–660. Tenant's remedies for landlord's unlawful ouster or exclusion. If a landlord unlawfully ... excludes the tenant from the premises, or willfully diminishes services to tenant by interrupting or causing interruption of essential services, the tenant *may recover possession* or terminate the rental agreement and, in either case, the tenant may recover an amount equal to three months' periodic rent or twice the actual damages sustained by him, ... and reasonable attorney's fees.

§27—40—790. (d) If the amount of rent due is determined at *final* adjudication to be less than alleged by the landlord, decision *must be* entered *for the tenant* if he has complied fully with the provisions of this section.

§27—40—910. Retaliatory conduct prohibited.

(a) [A] landlord *shall not* retaliate by increasing rent to an amount in excess of fair-market value or decreasing essential services or by bringing an action for possession after ... the tenant has complained to the landlord of violation of this chapter.

(b) If the landlord acts in violation of subsection (a), the tenant is entitled to the remedies provided in §27—40—660 as a defense *in any retaliatory action against him for possession.*

(f) In an action for possession where the tenant raise[s] a defense under this section, [and] files an Answer to the Rule, the court shall hear the matter as promptly as is feasible.

(g) If the landlord retaliates against the tenant for engaging in conduct protected under section (a) by refusing to renew the lease, and if the tenant is not in default as to payment of rent, *the landlord may not recover possession of the dwelling unit* for seventy five days *and may not increase rent to an amount in excess of fair-market value or decrease essential services* pending the recovery of the dwelling unit provided that the tenant *proves* the landlord's violation of this chapter, the landlord had notice of such violation, and the landlord had notice of the tenant's complaint prior to expiration of the lease.

(h) Any landlord who acts in retaliation against the tenant for engaging in protected conduct is liable for ... three months' rent or treble the actual damages sustained by the tenant ... and ... attorney's fees. [bolding, underlining and italics added for various degrees of emphasis]